

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027  
(Filed February 28, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING ADMITTING  
EXHIBIT 72 INTO THE EVIDENTIARY RECORD**

By this ruling, Exhibit 72 is admitted into the record. This exhibit was provided on a late-filed basis pursuant to the sequence of events outlined below. During the evidentiary hearings on August 11, 2005, in conjunction with cross examination of SBC witness James Kahan, Office of Ratepayer Advocates (ORA) introduced Exhibit 60.

Exhibit 60 was an ORA letter to Bill Blase inquiring as to whether SBC had complied with the "California Commitments" made in the course of the 1996 SBC/Telesis merger. (*See* D.97-03-067.) At the time that ORA moved for admission of Exhibit 60, SBC counsel argued that if Exhibit 60 comes into evidence, then in order to complete the record, SBC should be permitted to introduce into evidence the SBC documents that were responsive to the letter. Accordingly, the ALJ admitted Exhibit 60, but reserved a placeholder as

Exhibit 72 relating to SBC's response to ORA's assertions that SBC had failed to satisfy commitments made in connection with the SBC/Telesis merger.

The admission of Exhibit 72 was deferred pending production of the subject materials and to allow for SBC and ORA to resolve any differences over the admission of the materials that SBC sought to enter into evidence as Exhibit 72. On September 2, 2005, counsel for ORA sent a letter to the Administrative Law Judge, providing an update of discussions between Applicants and ORA concerning whether, or under what conditions, ORA would not object to the admission into evidence of Exhibit 72.

In its September 2, 2005 letter, ORA stated that it had reviewed the materials that SBC seeks to enter into the record as Exhibit 72. Based on that review, ORA claimed that the materials are incomplete, misleading, and confusing. With its cover letter dated September 2, 2005, ORA attached a Declaration of Messrs. Piiru and Simmons setting forth what ORA claimed to be the incomplete and misleading nature of Exhibit 72. ORA also provided four separate documents as confidential attachments to the Declarations.

As a resolution of parties' dispute ORA proposed two alternatives. (1) If Exhibit 72 is *not* admitted, ORA would likewise withdraw Exhibit 60, and would agree not to rely upon it or upon any testimony by Kahan or others in relation to Exhibit 60 for any further argument in this case, or (2) If Exhibit 72 *is* admitted, ORA would not object as long as ORA's the Declaration of Messrs. Piiru and Simmons also be admitted (as Exhibit 72.5-C). By designating the exhibit with a "C", it would be a confidential exhibit filed under seal.

SBC counsel sent a letter to the ALJ on September 6, 2005. SBC opposes either of the procedural options proposed by ORA in response to the ORA letter. In its September 6 letter, SBC seeks the admission of Exhibit 72 without

permitting ORA either to withdraw Exhibit 60 or to enter into evidence ORA's proposed Exhibit 72.5-C.

SBC opposes withdrawal of Exhibit 60, arguing that because ORA raised the issued of SBC's satisfying its commitments under the SBC/Telesis merger, Applicants are entitled to respond. SBC argues that ORA should not be permitted to "cherry pick" the evidence to suit its position.

SBC likewise opposes admission of ORA's proposed Exhibit 72.5-C, characterizing it as improper late-filed surrebuttal testimony. Applicants argue that admission of such testimony after the close of hearings would violate due process as Applicants would have no opportunity to respond. Applicants further argue that the Declaration is not contemporaneous with Exhibits 60 and 72, and makes reference to proceedings and issues that are beyond the scope of either of those documents.

SBC also argues that while Exhibit 72 is a contemporaneous response to Exhibit 60, ORA is not seeking to introduce a further contemporaneous response through Exhibit 72.5-C. Instead, SBC characterizes ORA Exhibit 72.5-C as new testimony outlining ORA's current position on the subject.

### **Discussion**

It is ruled that Exhibit 72 is admitted into evidence. At the time SBC proposed to introduce the response to Exhibit 60 (the Blase letter), ORA did not object in principle, but merely expressed a desire to review the documents at the time they were provided by SBC. ORA has not provided a valid basis to exclude Exhibit 72 from the evidentiary record.

ORA's claims that the materials in Exhibit 72 are incomplete, misleading, and confusing do not provide a basis to strike Exhibit 72 from the record. Those criticisms go to the issue of how the evidence in Exhibit 72 is interpreted and

weighed, but not to the admissibility of the exhibit, itself. Through the briefing process, ORA will have the opportunity to present criticisms of Exhibit 72 and to explain its claims that the materials in Exhibit 72 are “incomplete, misleading, and confusing.”

The “Declarations of Messrs. Piiru and Simmons”, however, cross the line beyond authentication of Exhibit 72. The ORA “Declarations” essentially constitute expert witness surrebuttal testimony to Exhibit 72. Procedurally, admitting such testimony, together with the confidential attachments, at this late date in the proceeding would constitute a violation of due process. The cut off date for introducing new expert witness testimony has passed, and admitting such new testimony without permitting Applicants an opportunity to respond would be prejudicial.

Likewise, ORA’s proposal to withdraw Exhibit 60 is not accepted. Exhibit 60 has already been received into evidence, and it is too late for ORA to “withdraw” it from the record after the fact.

**IT IS RULED** that:

1. Late-Filed Exhibit 72 is hereby admitted into the record.
2. ORA’s request to have admitted into the record the Declarations of Messrs. Piiru and Simmons, together with the confidential attachments thereto, is denied.

Dated September 7, 2005, at San Francisco, California.

/s/ Thomas R. Pulsifer  
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Thomas R. Pulsifer  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Admitting Exhibit 72 into the Evidentiary Record on all parties of record in this proceeding or their attorneys of record.

Dated September 7, 2005, at San Francisco, California.

/s/ Antonina V. Swansen  
Antonina V. Swansen

**N O T I C E**

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